STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

MIDWEST GENERATION, LLC	:	
	:	
v.	:	
	:	
COMMONWEALTH EDISON COMPANY	:	Docket No. 01-0562
	:	
Complaint as to unjust, unreasonable, and anti-competitive energy and capacity charge for station power, request for refunds, with interest, and other relief.	:	

REPLY OF COMMONWEALTH EDISON COMPANY
IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

Commonwealth Edison Company ("ComEd") for its reply in support of its motion to dismiss the Complaint of Midwest Generation, LLC ("Midwest"), states as follows.

I.

Summary of Argument

The Complaint shows that Midwest and ComEd entered into non-tariffed Memoranda of Understanding ("MOUs") for electric service provided to the former ComEd fossil stations purchased by Midwest. ComEd moved to dismiss the Complaint because it is defective as a matter of law in several respects, among them that the Commission does not have jurisdiction to change the terms of the MOUs in any respect.

A plain reading of the Public Utilities Act shows that the Commission does not have authority to declare the MOUs void, to reform the MOUs to provide for other terms not agreed to by the parties, or to retroactively reduce the MOUs' contract price to zero by ordering a refund of all amounts paid for electric service under the MOUs to ComEd by Midwest. This is because the MOUs constitute agreements for "contract service" which, by definition, are among the

"competitive services" under the Illinois Public Utilities Act ('the "Act") over which the Commission's jurisdiction is strictly limited pursuant to Section 16-116(b) of the Act. 220 ILCS 5/16-116(b); 220 ILCS 5/16-102 (defining "contract service" and "competitive services").

Midwest's Response to ComEd's Motion to Dismiss (the "Response") nowhere addresses the provisions of Section 16-116(b) that negate its Complaint. That section provides that the Commission "shall not increase or decrease the prices, and may not alter or add to the terms and conditions for the utility's competitive services, from those agreed to by the electric utility and the customer or customers…." 220 ILCS 5/16-116(b). Midwest's Response also fails to address the plain language of Section 16-102 of the Act that specifically defines "competitive services" as including "contract service" for "power, energy and other services" (220 ILCS 5/16-102). From the face of the Complaint, it is clear that the MOUs, by contract, provide power, energy, and other services for Midwest's generating stations. Complaint, ¶¶ 2-3. Accordingly, Midwest's requests that the Commission alter the terms of the MOUs, void the MOUs, or refund all sums paid under the MOUs are barred by the Act and are beyond the authority of the Commission.

While the Response points to Articles IX, X, and XVI of the Act as grounds for Commission jurisdiction (Response at 3, 7-8), this is plainly incorrect. Section 16-116(b) provides that "non-tariffed competitive services shall not be subject to the provisions of the Electric Supplier Act or to Articles V, VII, VIII or IX of the Act." 220 ILCS 5/16-116(b). Because the MOUs are for non-tariffed competitive services as defined in Section 16-102 and governed by Section 16-116(b), Midwest simply has no legal right to ask the Commission to re-open or examine the MOUs under Article IX of the Act.

Moreover, to state a cause of action under the Commission's Section 10-108 complaint jurisdiction, Midwest must allege facts showing some violation by ComEd of an applicable portion of the Act, a regulation or an Order of the Commission. 220 ILCS 5/10-108. As discussed above, Midwest cannot rely upon allegations of a violation of Article IX due to that Article's inapplicability to contract service. Moreover, Midwest's citation to Section 10-101 of the Act provides no basis for the Complaint, because that Section simply grants the Commission authority to hold investigation proceedings. 220 ILCS 5/10-101. It does not provide a substantive basis for complaints. And, it certainly does not override the specific bar of Section 16-116(b).

Midwest's reliance on Article XVI is also misplaced. Response at 7-8. Midwest relies upon merely prefatory portions of Article XVI of the Act as the basis for a claimed cause of action, which is legally improper because, as explained below, such provisions do not create substantive rights for Midwest. Finally, Midwest's citations and characterizations of a recent FERC order (Response at 8-10) fail to state a claim for which relief can be granted by this Commission. This is because the PJM Orders referred to construe the Federal Power Act, not the Illinois Public Utilities Act; are orders of the FERC, and not of this Commission; and ordered no relief with respect to ComEd. Accordingly, even if it were true (which it is not) that ComEd somehow was in violation of an order by the FERC involving a proceeding in which no relief was granted as to ComEd, such a violation (by definition of matters within the FERC's jurisdiction under the Federal Power Act) would not constitute a violation of the Illinois Public Utilities Act or any Commission regulation or Commission Order -- which is required in order to invoke Commission jurisdiction under Section 10-108. Moreover, Midwest's Response makes

clear that it seeks from the Commission equitable relief that is beyond the Commission's authority to grant.

Finally, Midwest fails to address the fact that it has not respected the binding dispute resolution provisions of the contracts. Nor has it plead any excuse for not doing so. For all of these reasons, Midwest's Complaint and its Response to ComEd's Motion to Dismiss fail to establish any legal basis upon which relief may be granted by the Commission, and Midwest's Complaint should be dismissed with prejudice.

II.

The Complaint Should Be Dismissed Because the Act Precludes Changing Prices, Terms or Conditions of Contract Service

The agreements between ComEd and Midwest are for "contract service" within the meaning of Section 16-102 of the Act. Accordingly, pursuant to Section 16-116(b) of the Act, the Commission cannot change or alter the MOUs, render them void, or order refunds of the charges. Seeking to avoid these clear provisions of the Act, Midwest's Response claims that: (i) a Section 16-102 agreement for "contract service" cannot include ComEd's provision of power, energy, and all of the services needed to get it to Midwest's plants; and, (ii) because no other market participant could provide such service, by definition the MOUs cannot be for "competitive service" under the Act. Response at 4-7. These claims are contrary to the plain language of the Act, and should be rejected.

A. The MOUs are for Contract Service Pursuant to Section 16-102 of the Act

Based upon a plain reading of the Act, and going no further than the facts pleaded in the Complaint, it is clear that the MOUs are for "contract service" authorized by the Illinois legislature. Section 16-102 of the Act provides that "'competitive service' includes … (ii) contract service." 220 ILCS 5/16-102. "Contract service" in turn is defined as:

> (i) services including the provision of electric power and energy or other services, that are provided by mutual agreement between an electric utility and a retail customer that is located in the electric utility's service area, provided that, delivery services shall not be a contract service until such services are declared competitive pursuant to Section 16-113.

220 ILCS 5/16-102.

The Complaint plainly alleges that the MOUs "require Midwest to purchase from ComEd all energy and capacity to serve the auxiliary load at Midwest's generating stations." Complaint, ¶¶ 2-3. Accordingly, assuming the facts alleged in the Complaint to be true, as required for a motion to dismiss, these services fall within the Section 16-102 contract service definition of "services including the provision of electric power and energy or other services." 220 ILCS 5/16-102. Midwest cannot deny this.

Instead, Midwest asserts that a "competitive service" (i.e., including contract service) cannot be a "tariffed service" (Response at 5). This assertion, however, actually reinforces the fact that the MOUs are for competitive service, and not "tariffed service" as defined in the Act. Under the Act, "tariffed service" means:

> services provided to retail customers by an electric utility as defined by rates on file with the Commission pursuant to the provisions of Article IX of this Act, but shall not include competitive services.

220 ILCS 5/16-102. Only tariffed service is subject to the Commission's Article IX jurisdiction, and there are no allegations that the MOUs are provided pursuant to rates on file with the Commission, or constitute tariffed service. Accordingly, Midwest's position that "competitive service" is not a "tariffed service" provides further support for ComEd's position that the MOUs are not subject to the Commission's Article IX jurisdiction, but rather are protected from changes pursuant to Section 16-116(b) of the Act.

Midwest's Response states that the MOUs provide for bundled service, meaning that power and energy is sold on a delivered basis, including metering and billing. Response at 2. Such a contract clearly falls within the definition of contract services permissible under Section 16-102. The contracts provide for power and energy, and "other services" and therefore fall within the definition of "contract service" pursuant to Section 16-102. Nothing in Sections 16-102 or 16-116(b) prohibits parties from taking bundled contract service.

Section 16-102 precludes providing "delivery services" on a contract service basis, until delivery services are declared competitive pursuant to Section 16-113 of the Act. The MOUs are consistent with this requirement. Section 16-102 defines "delivery services" as services "necessary in order for the transmission and distribution systems to function so that retail customers located in the electric utility's service area can receive electric power and energy from suppliers other than the electric utility." 220 ILCS 5/16-102 (emphasis added). The MOUs contemplate ComEd, not some other supplier, providing power and energy to Midwest's stations. Response at 6. Accordingly, the inclusion of ComEd's own use of its transmission and distribution facilities to deliver its own energy provided pursuant to the MOUs is consistent with Section 16-102. Midwest's claim that the MOUs are for "delivery services" (Response at 5) and not contract service is therefore incorrect, and should be rejected.

Section 16-116(b) of the Act authorizes ComEd to "offer any competitive service to any customer or group of customers without filing contracts with or seeking approval of the Commission, notwithstanding any rule or regulation that would require such approval." 220 ILCS 5/16-116(b). This language implemented a deliberate and calculated policy decision of the General Assembly to empower utilities to provide by contract many of the services formerly only available under tariffs, without Commission rate regulation. Thus, the MOUs for contract

service in this proceeding, pursuant to Section 16-116(b) quoted above, are not subject to any Commission filing or approval requirement. 220 ILCS 5/16-116(b). Midwest's claim that ComEd engaged in improper "self-regulation" (Response at 6-7) is incorrect and should be rejected by the Commission.

"Contract service" is a specific type of competitive service defined by the legislature in Section 16-102 of the Act. The only requirement for a service to constitute contract service is that it meet the definition contained in that section -- meaning "services, including the provision of electric power and energy or other services, that are provided by mutual agreement between an electric utility and a retail customer…." 220 ILCS 5/16-102. As discussed above, the MOUs plainly meet this definition and thus constitute "competitive services" because "competitive service" includes … (ii) contract service…." 229 ILCS 5/16-102. There is no requirement in the law that some other supplier has to be able to offer all of the elements of the contract service in order for the contract service to be "competitive service" within the meaning of the Act. Accordingly, Midwest's argument that "contract service" cannot be "competitive service" under Section 16-102 because Midwest "had no competitive alternative" and "did not meet the eligibility requirements for obtaining power and energy from an alternative supplier" (Response at 6) makes up a requirement that does not exist in the law, and should be rejected.

III.

Because the Complaint Fails to State a Claim Under Articles IX, X or XVI of the Act, the Complaint Should Be Dismissed

Midwest's Response asserts that the Commission has jurisdiction over the Complaint pursuant to Articles IX, X and XVI of the Act. Response at 6-8. For the reasons explained below, Midwest's claims are incorrect and should be rejected.

A. Contract Service is Not Subject to Article IX of the Act.

Section 16-116(b) of the Act provides that the Commission "shall not increase or decrease the prices, and may not alter or add to the terms and conditions for the utility's competitive services, from those agreed to by the electric utility and the customer or customers." 220 ILCS 5/16-116(b). The Section clearly provides that "non-tariffed competitive services shall not be subject to the provisions of the Electric Supplier Act or to Articles V, VII, VIII or IX of the Act." 220 ILCS 5/16-116(b). Accordingly, because the Commission has expressly exempted contract service from Article IX jurisdiction (including claims of Section 9-241 rate discrimination, and "just and reasonable" rate claims pursuant to Article IX), Midwest's assertion that the Commission has jurisdiction to consider whether the MOUs constitute a "just and reasonable" rate under Article IX of the Act (Response at 3, 6-7) is incorrect.

B. Sections 10-101 and 10-108 of the Act Do Not Support Midwest's Claims for Relief

Midwest claims that Sections 10-101 and 10-108 of the Act provide a basis for jurisdiction in this proceeding. Response at 8. This is incorrect. Section 10-101 provides the Commission or a hearing examiner designated by the Commission authority "to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act." 220 ILCS 5/10-101. This is the regulatory authority for the Commission to conduct proceedings on matters within its jurisdiction, and sets the basic ground rules for Commission hearings. It does not provide any substantive basis for granting relief, or establish the elements that must be pleaded for a complaint.

Section 10-108 also does not provide a basis for relief based upon the facts alleged in the Complaint. To state a cause of action in a Commission complaint pursuant to Section 10-108, the complaint must set forth in writing "any act or things done or omitted to be done in violation,

or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission." 220- ILCS 5/10-108. As discussed above, Article IX does not apply to contract service, so claimed violations of that Article fail to state a basis for complaint in this proceeding. In addition, as explained below, the prefatory provisions of Article XVI relied upon by Midwest do not create any substantive rights on which Midwest can base a claim.

C. Prefatory Portions of Article XVI of the Act Do Not Support Midwest's Claims for Relief

Midwest also claims that Article XVI is a basis for granting relief. Response at 7-8. However, Midwest ignores Sections 16-102 and 16-116(b), substantive provisions of Article XVI that doom its claims. Instead, Midwest points only to the prefatory language of Article XVI that recites legislative findings concerning a variety of general principles and that introduces the substantive portions of Article XVI so damning to its Complaint. (Response, p. 7, citing and quoting 220 ILCS 5/16-101(A)(d)). These general statements that "a competitive wholesale and retail market must benefit all Illinois citizens", and that the Commission should "promote the development of an effectively competitive electricity market" clearly constitute general policy goals and do not grant any specifically enforceable rights, or create any causes of action, that Midwest can rely upon to sustain a complaint.

It is well established under Illinois law that such general prefatory statements of legislative findings and intent do not create substantive rights of a party. As the Illinois Appellate Court stated in Monarch Gas Company v. Illinois Commerce Commission, 261 Ill. App. 3d 94, 99, 633 N.E.2d 1260, 1264-65 (5th Dist. 1994):

> Section 1-102 of the Public Utilities Act is nothing more than prefatory. As such it is of no substantive or positive legal force: "Prefatory language … generally is not regarded as being an operative part of statutory enactments. The function of a statute is to supply reasons and explanations for the legislative enactments. The preamble does not confer powers or determine rights. [Citation.] A declaration

> of policy contained in a statute is, like a preamble, not a part of the substantive portions of the act…. Illinois Independent Telephone Association v. Illinois Commerce Commission (1988), 183 Ill. App. 3d 220, 236-37, 132 Ill. Dec. 154, 163, 539 N.E.2d 717, 726.

The portions of Article XVI relied upon by Midwest are simply the prefatory and policy portions of the Article XVI amendments to the Public Utilities Acts passed by the legislature in 1997. They perform the same limited statutory function of explanation and guidance for interpretation of the Act -- and do not create substantive rights enforceable through a complaint -- just as is the case with the prefatory portions of Section 1-102 of the Act referred to in Monarch Gas Company and Illinois Independent Telephone Association.

What is more, the General Assembly was not silent on how these goals should be accomplished. Just a few pages later, the General Assembly enacted its determination that contract services should not be subject to Commission rate regulation. Accordingly, Midwest's citation to the general prefatory and policy language contained in Section 16-101(A)(d) and generalized claims of suffering "competitive harm" (Response at 7, 10) fail to support any claim for relief that can be granted by the Commission, and the Complaint should be dismissed.

D. Midwest's Reliance Upon a FERC Decision Construing the Federal Power Act Fails to Allege any Violation of the Illinois Public Utilities Act, a Commission Rule or Commission Order

Midwest asserts that its claims for relief from the Commission are supported by the FERC's recent decisions in PJM Interconnection, LLC, 94 FERC ¶ 61,251, at 61,889, order denying reh'g, 95 FERC ¶ 61,333. (Response, pp. 8-10). As a legal matter, the PJM decisions have nothing to do with the Commission's jurisdiction or authority to grant relief.

The PJM decisions involved construction by the FERC of provisions of the Federal Power Act, not the Illinois Public Utilities Act. The FERC's PJM decisions related to FERC tariffs, and utilities that did not involve or relate to ComEd. The PJM decisions by definition did

not involve allegations of any violation of the Illinois Public Utilities Act, any Commission regulation, or order of the Commission, which allegations are required in order to state a complaint under Section 10-108 of the Act. 220 ILCS 5/10-108. Accordingly, Midwest's references to the PJM decisions (Response at 8-10, Complaint at ¶¶ 5-9) fail to provide any basis for relief from the Commission, and the Complaint should be dismissed.

IV.

Because the Commission Does Not Have Authority to Grant Equitable Relief, the Complaint Should be Dismissed

Midwest's Response claims that "the Commission should find that these Agreements [the MOUs] are void ab initio and immediately find that Midwest can self-supply its auxiliary power requirements." (Response at 10). No request for this relief is pleaded in the Complaint. Accordingly, the Commission should disregard Midwest's arguments in this respect in ruling upon ComEd's motion to dismiss. For purpose of completeness, however, and to avoid efforts to replead for plainly unlawful relief, the Commission should be aware that such a finding and relief is beyond the Commission's authority. This further supports dismissal of the Complaint.

Midwest's request that the Commission declare the MOUs void ab initio exceeds the Commission's jurisdiction. Under Illinois law, a request to rescind a contract or have it declared void ab initio is addressed to the equitable jurisdiction of the courts. See, e.g., Wilkonson v. Yovetich, 249 Ill. App. 3d 439, 446, 618 N.E.2d 1120 (1st Dist. 1993) (rescission is a remedy that may be granted by a court sitting in equity). Unlike a circuit court sitting in equity, the Commission has limited jurisdiction proscribed by the Act. The Commission does not have the authority to consider or to grant requests for equitable relief of the nature granted by a court of chancery, and Midwest's claim should be dismissed.

The Commission derives its power solely from the Public Utilities Act and has only the authority that is expressly conferred upon it by law. Illinois-Indiana Cable Television Assoc. v. Illinois Commerce Comm., 55 Ill. 2d 205, 302 N.E.2d 334 (Ill. 1973). It may not, by its own act, extend its jurisdiction. Ace Ambulance & Oxygen Co. v. Illinois Commerce Comm., 75 Ill. App. 3d 17, 393 N.E.2d 1322 (3d Dist. 1979). It may not impose its own interpretation of a statute where the legislative intent is otherwise clearly manifested. Allied Delivery System, Inc. v. Illinois Commerce Comm., 93 Ill. App. 3d 656, 667-68, 417 N.E. 2d 777 (1st Dist. 1981).

No portion of the Act is referred to or relied upon by Midwest in its Response -- and there is none -- granting equitable powers to the Commission to order rescission or reformation of an agreement for contract service, or to declare such a contract "void ab initio." (Response at 9-10). Accordingly, the Complaint should be dismissed.

Moreover, even if the Commission had jurisdiction to consider equitable claims like those heard in chancery, the Complaint is deficient because it does not plead the elements required under Illinois law to obtain a ruling of rescission or that an agreement is void ab initio. See, e.g., Cameron v. Bogusz, 305 Ill. App. 3d 267, 273, 711 N.E.2d 1194, 1198-9 (1st Dist. 1999) (elements for equitable pleading of rescission due to unilateral mistake); Farmers Automobile Insurance Association v. Pursley, 130 Ill. App. 3d 980, 984-5, 267 N.E.2d 734 (5th Dist. 1971) (rescission is the remedy of declaration of an agreement to be void from its inception; stating elements of equitable rescission based upon misrepresentation); Wilkonson, 249 Ill. App. 3d at 445-6 (elements for equitable pleading of rescission due to failure of consideration or mistake of fact).

Considering these authorities, there are no facts at all alleged in the Complaint describing or touching upon such equitable claims of fraud, unilateral mistake, substantial non-performance

or breach, or mistake of fact. Accordingly, even if the Commission had authority to hear an equitable claim to declare the MOUs void ab initio or for rescission, the Complaint fails to state a claim for which relief can be granted.

Finally, courts sitting in equity "ordinarily will not order the rescission of a contract where the parties cannot be placed in the status quo ex ante." Wilkonson, 249 Ill. App. 3d at 446. Midwest's Complaint does not propose to, nor can it, return to ComEd the massive amounts of electric power and energy and related services provided to the Company over the term of the MOUs to date. On the contrary, Midwest's claim would permit it to simply retain the benefits of the energy and get a refund for all it paid. This failure alone would be sufficient to sustain dismissal of the Complaint. Accordingly, even if the Commission had jurisdiction to sit in equity like a circuit court -- which it does not -- the Complaint fails to state a claim for rescission or declaration that the MOUs are void ab initio.

V.

The Complaint Should be Dismissed for Mandatory Arbitration Pursuant to the Agreements

Each of the MOUs contains an identical provision wherein ComEd and Midwest agreed to use alternative dispute resolution procedures and to submit to arbitration "any dispute, claim, controversy or failure to agree arising out of, relating to, or connected with this MOU or the breach, interpretation, termination or validity thereof." (MOUs, p. 8). Midwest's claims in its Complaint challenging the validity of the contracts, and seeking other relief, plainly fall within the scope of these provisions due to their broad language.

Midwest's assertion in its Response that "Midwest is not seeking to have the Commission resolve a dispute under the Agreement" (Response at 8) is incorrect. Midwest expressly claims that it is asking that the Commission declare the Agreements void ab initio (Response at 8),

which is plainly a "claim … arising out of, relating to, or connected with this MOU or the … validity thereof." (MOUs at 8). "[A]rising out of" and "in connection with or relating to" language is considered to create a "generic" arbitration clause. See Johnson v. Baumgardt, 216 Ill. App. 3d 550, 558 (2d Dist. 1991). Under Illinois law, use of such generic arbitration clauses signifies Midwest's agreement to submit all matters concerning the contract to arbitration. Id. at 559. Moreover, the arbitration language specifically extends not just to disputes arising under the MOUs, but expressly includes disputes relating to the "validity thereof." There can be no serious argument that Midwest's claim is not covered within the bounds of this agreement.

Accordingly, the Commission should dismiss the Complaint in this proceeding foremost because it does not have authority to consider or render a decision with respect to the prices or any other terms and conditions of the MOUs, and because the Complaint fails to state any cognizable claim under the Act. This is not to say that Midwest is without a forum in which its claims, meritless though they are, can be heard. In signing the MOUs, Midwest agreed to submit its claims for arbitration as provided for in the MOUs. Dismissing the Complaint facilitates resolution of the issues through the alternative dispute resolution mechanism to which Midwest agreed and contracted, if it chooses to do so.

By the same token, the Commission does not have authority to alter or waive Midwest's obligations under the terms and conditions of the MOUs with respect to arbitration, as these themselves are contained in the contract service agreements that the Commission cannot vary pursuant to Section 16-116(b). For these additional reasons, the Commission should enter an order dismissing the Complaint.

CONCLUSION

For all of the foregoing reasons, Commonwealth Edison Company requests that the Illinois Commerce Commission enter an order dismissing Midwest Generation, LLC's Complaint in this proceeding, with prejudice.

Dated: October 16, 2001

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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CERTIFICATE OF SERVICE

I, E. Glenn Rippie, do hereby certify that a copy of the foregoing Reply of Commonwealth Edison Company in Support of its Motion to Dismiss the Complaint was served upon all parties on the attached Service List by the method so indicated this 16th day of October, 2001.

E. Glenn Rippie

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